

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARL McCREE FOUNTAIN,

Petitioner,

No. CIV S-04-2350 GEB DAD P

vs.

JAMES YATES, Warden,

Respondent.

ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's July 24, 2006, denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is “debatable among jurists of reason,” could be resolved differently by a different

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1 court, or is “adequate to deserve encouragement to proceed further.” Jennings v. Woodford,
2 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).¹

3 Petitioner has made a substantial showing of the denial of a constitutional right in
4 the following issues presented in the instant petition: (1) whether his trial and appellate counsel
5 rendered ineffective assistance; (2) whether the evidence was insufficient to support his
6 conviction on the charge of burglary; and (3) whether his sentence constitutes cruel and unusual
7 punishment.

8 Petitioner has also filed a request to proceed in forma pauperis on appeal. The
9 court file reflects that petitioner paid the filing fee for this action.

10 Rule 24(a) of the Federal Rules of Appellate Procedure provides that a party to a
11 district court action who desires to appeal in forma pauperis on appeal must file a motion in the
12 district court which:

13 (A) shows in the detail prescribed by Form 4 of the Appendix of
14 Forms the party’s inability to pay or to give security for fees and
 costs;

15 (B) claims an entitlement to redress; and

16 (C) states the issues that the party intends to present on appeal.

17 Fed. R. App. P. 24(a)(2). If the party is a prisoner, he must attach a statement certified by the
18 appropriate institutional officer showing all receipts, expenditures, and balances during the last
19 six months in his institutional accounts. Appendix of Forms, Form 4, item 5. Petitioner has
20 attached an uncertified trust account statement for the period April 1, 2006 through May 18,
21 2006. That statement does not comply with the requirements of Fed. R. App. P. 24(a)(2) and
22 Form 4 of the Appendix of Forms. Accordingly, petitioner’s request to proceed in forma
23 pauperis on appeal will be denied.

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25 ¹ Except for the requirement that appealable issues be specifically identified, the standard
26 for issuance of a certificate of appealability is the same as the standard that applied to issuance of
a certificate of probable cause. Jennings, at 1010.

1 Petitioner has also filed a motion for reconsideration of this court's July 24, 2006,
2 order adopting the findings and recommendations of the magistrate judge. That motion will be
3 denied.

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. A certificate of appealability is issued in the present action;
- 6 2. Petitioner's motion to proceed on appeal in forma pauperis is denied; and
- 7 3. Petitioner's motion for reconsideration is denied.

8 Dated: August 28, 2006

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10 /s/ Garland E. Burrell, Jr.
11 GARLAND E. BURRELL, JR.
12 United States District Judge
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